SERVED: February 8, 1995

NTSB Order No. EA-4315

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 19th day of January, 1995

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. DONALD BRADFORD McCOLL, Respondent.	)	Docket SE-13358

OPINION AND ORDER

Respondent has appealed from the oral initial decision of Administrative Law Judge William E. Fowler, Jr., issued on June 21, 1994, following an evidentiary hearing.[1] The law judge affirmed an order of the Administrator, on finding that respondent had violated 14 C.F.R. 91.123(a) and 91.13(a).[2] The

[1]The initial decision, an excerpt from the hearing transcript, is attached.

[2]§ 91.123(a) provides:

law judge also affirmed the Administrator's 30-day proposed suspension of respondent's commercial pilot certificate. We deny the appeal.

The facts are not in dispute. Respondent, as pilot-in-command of a Model C-90 King Air, departed Bowling Green, KY with an active Instrument Flight Rules (IFR) flight plan and a clearance from ATC to 3,000 feet (see Exhibit A-2 transcript 2136:45 clearance instruction to "maintain three thousand . . . can expect seventeen one seven thousand one zero minutes after departure"). The transcript of communications with ATC once the aircraft was off the ground (Exhibit A-3) indicates and respondent acknowledges (Appeal at 4) that, soon after takeoff (A-3 at 2144:38), ATC queried the aircraft regarding its altitude. Respondent replied that his altitude was 3,400 feet (Tr. at 130), and his co-pilot acknowledged that the aircraft's assigned altitude was 3,000.[3] ATC advised the aircraft of helicopter traffic at 4,000 feet. Shortly thereafter, the

(..continued)

(a) When an ATC [air traffic control] clearance has been obtained, no pilot in command may deviate from that clearance, except in an emergency, unless an amended clearance is obtained.

§ 91.13(a) provides:

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

[3]Respondent contends (see, e.g., Tr. at 130) that, up to this point, he believed the IFR clearance had been cancelled by his co-pilot/passenger (in which case, the aircraft would not have been subject to the 3,000-foot clearance). Respondent, however, did not offer as a defense that he had reasonably relied on his co-pilot canceling the clearance, nor does he argue this point on appeal.

aircraft reported its altitude as 3,000, and acknowledged that it had the other craft in sight. At 2148:29, ATC again contacted the aircraft to report it showed on the radar scope at 3,400 feet. Radar had initially tagged the aircraft at 2145:55, at which time it was recorded at 3,100 feet and climbing (i.e., already in violation of the clearance to maintain 3,000 feet). See Exhibit A-4 radar data. These data confirm the ATC transcript: an initial climbout to well above 3,000 feet, a descent of a few hundred feet, and then a second climb. At its highest, the aircraft was tagged at 3,400 feet (at 2148:17). The aircraft did not receive clearance to an altitude above 3,000 feet until 2149:21.[4]

On appeal, respondent first argues that the law judge erred in affirming the order because the Administrator acted contrary to his own policy and should not have brought the action. Although we agree with respondent that this is an issue we must consider, we see no inconsistency or violation between the Administrator's action and his written policy.

As noted, Exhibit R-1 contains the Administrator's

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[4]The initial decision, in reporting a 2,000-foot clearance (Tr. at 187), contains a typographical error. See id. at 189.

The Administrator's order of suspension suggests that there was only one deviation and despite the testimony the initial decision does not clarify the matter. At the hearing, counsel for the Administrator explained that, although the suspension order was premised on only one deviation count, pursuant to the Administrator's enforcement policy (Compliance/Enforcement Bulletin No. 86-1, Exhibit R-1), the other deviation would constitute grounds for enforcement action. See discussion, infra.

enforcement policy regarding computer-detected altitude deviations of 500 feet or less. It provides, as pertinent, that an order of suspension should not be issued unless:

> a prior altitude deviation occurred within 2 years of the date of the subject altitude deviation or other aggravating circumstances require initiation of legal enforcement action. In determining whether a violation is "aggravated," all circumstances surrounding the incident (e.g., whether the deviation was deliberate or inadvertant [sic], the hazard to safety, etc.) shall be considered.

Respondent argues that he had no prior deviation, having a clean record, and that there were no aggravating circumstances. The Administrator cites as aggravating circumstances: the first deviation, and the loss of separation from the helicopter.[5] We agree with the Administrator that, after the first deviation, respondent should have had a heightened awareness of his altitude. And, although respondent contends that the second deviation was caused by turbulence and the inability of his autopilot to keep the aircraft at the cleared altitude, there is no allegation or indication in the transcript of ATC communications that respondent made any attempt to advise ATC that he was having any such problem. The record therefore supports a finding that respondent's second deviation reflected a marked lack of awareness and attention at best, and that this failure qualified as aggravating circumstances. We also agree, despite the fact that the aircraft were moving away from each

[5]At the closest point, the two aircraft came within 600 feet of each other's altitudes when approximately 2 1/2 miles apart. Testimony indicated that expected separation is 5 miles (when at the same altitude) or 1,000 feet.

other rather than converging and the testimony of the Administrator's witnesses that they saw no real danger, that the loss of separation may constitute an aggravated circumstance due to the inherent safety risk in high speed craft traveling so close to each other. Indeed, although respondent testified that the helicopter was never out of his sight (Tr. at 162), the written statement of his co-pilot/passenger (Exhibit R-2), introduced by respondent, notes the contrary ("Both Brad McColl and I attempted to locate the conflicting traffic. Several minutes latter [sic] we spotted the traffic and notified ATC."). The Exhibit A-3 transcript indicates that approximately 1 minute passed between the time ATC advised of the helicopter and respondent's acknowledgment.

Respondent next argues that the law judge erred in denying his motion for summary judgment and in quashing his subpoena of Mr. William Nelmes, an FAA attorney.[6] We find no error. As the law judge noted at the close of the Administrator's case (Tr. at 108), the Administrator made a prima facie case subject to rebuttal by respondent. The Administrator introduced competent evidence to prove two altitude deviations, a loss of separation with another aircraft, and respondent's involvement in the incident. That was sufficient to require respondent to present a

[6]We do not rely on respondent's characterization of his motion. Although respondent frames the issue as a lack of dispute as to material facts, the record (Tr. at 106-109) indicates that his motion is in the nature of a motion to dismiss for failure of proof, and the law judge interpreted it this way as well.

defense. We see no basis for dismissal (or summary judgment for respondent).

As to Mr. Nelmes, we fail to see any ethical lapse or harm or prejudice to respondent from Mr. Nelmes' actions. Mr. Nelmes participated in the informal conference in this case. There is no evidence that he had another connection with it. Respondent extensively cites precedent for the proposition that opposing counsel should not contact directly parties who have counsel. Even if Mr. Nelmes were opposing counsel in this case, he did not contact respondent. A non-attorney FAA investigator did, and in connection with a completely different investigation involving respondent. There is no showing or even an allegation that the investigator was making anything other than legitimate inquiries in connection with the case he was investigating. Not only do we see no violation of attorney rules of conduct, we see no harm to respondent nor has he made an offer of proof. Accordingly, we see no error in the law judge's decision to quash the subpoena issued for Mr. Nelmes.

Lastly, respondent argues that the § 91.13(a) charge must be dismissed because the FAA has not proven carelessness or endangerment or potential harm. The carelessness charge in this cause is derivative and need not be separately proven. See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17, and cases cited there (a violation of an operational regulation is sufficient to support a finding of a "residual" or

"derivative" carelessness violation).[7] We have repeatedly held, contrary to respondent's view, that Essery v. Department of Transportation, 857 F.2d 1286 (9th Cir. 1988) and Administrator v. Reynolds, 4 NTSB 240, 242 (1982) apply only to helicopter operations. See Administrator v. Erickson and Nehez, NTSB Order EA-3869 (1993). The wording of § 91.13(a) does not require otherwise.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The 30-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[8]

HALL, Chairman, HAMMERSCHMIDT and FRANCIS, Members of the Board, concurred in the above opinion and order.

[7]As such, it does not affect the sanction.

[8]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).